Supreme Court, U.S.
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No. 92-1233

In The

Supreme Court of the United States

October Term, 1992

COLLINS PINE COMPANY AND COLLINS PINE COMPANY, t/d/b/a/ KANE HARDWOOD DIVISION,

Petitioners,

v.

WILLIAM R. ROLICK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT WILLIAM R. ROLICK

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QUESTION PRESENTED

Whether, in a common law diversity action alleging negligence, the admission of an OSHA regulation as non-binding evidence of a standard of care owed by a possessor of land to an injured independent contractor contravenes 29 U.S.C. § 653(b)(4)?

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WILLIAM R. ROLICK,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT WILLIAM R. ROLICK

William R. Rolick respectfully opposes the petition for writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit entered in this case on September 23, 1992.

STATEMENT

On August 23, 1983, Petitioner, a company extensively involved in harvesting timber, entered into a Timber Sale Contract with the United States Department of

Agriculture's Forest Service to purchase, cut and remove (clearcut) from a certain area of the Allegheny National Forest designated as Turkey Ridge all timber meeting or exceeding contract specification. (R.13A-62A).

On October 1, 1984, Petitioner entered into a Logging Services Agreement with Nortim Corporation ("Nortim"), a logging insurance group, whereby Nortim was to perform various services in connection with the logging operations on Turkey Ridge, including the selection, hiring and scheduling of independent subcontractor loggers to cut and remove the timber. (R.63A-71A); *Rolick v. Collins Pine Co.*, 925 F.2d 661, 662 (3d Cir. 1991).

On October 1, 1984, Respondent entered into a Cutting and Hauling Contract with Nortim under which he was to work the second block of the Turkey Ridge tract by cutting and hauling timber that Petitioner had previously agreed to purchase from the Forest Service (R.72A-83A); Respondent had executed a similar contract with Nortim the previous year and worked the first block of Turkey Ridge at that time.

It was Petitioner's decision alone under the Timber Sale Contract to have the second block of Turkey Ridge opened and harvested by Respondent in January 1985.[1] (R.254A-258A). Respondent was working at Turkey Ridge on the morning of January 14, 1985 when he was struck

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[1] To obtain possession of a block of the premises, Petitioner had to prepay the Forest Service for the timber located thereon before actual harvesting operations could be conducted. Petitioner chose to prepay and harvest this second block of Turkey Ridge in January 1985, a time when all trees (living, dying and dead) were without leaves.

from behind across the neck and back by a falling birch tree which had been standing approximately 30 feet away. Respondent was rendered quadriplegic. (R.8A-11A).

At trial, Respondent presented evidence that the birch tree was dead and/or rotted to such an extent that it presented a hazard, and that this condition had existed for some period of time preceding Respondent's entry onto the land. In fact, the evidence was that the tree's hazardous condition would have been readily observable in the spring, summer and fall of 1984 by, among other things, its lack of leaves. (R.313A-318A, 340A-342A, 360A-362A).

It is Respondent's contention that had Petitioner, as the possessor of land, complied with logging industry standards requiring preliminary inspection of land and identification and/or removal of hazardous trees before the start of logging operations, Respondent, a business visitor upon the land, would have been forewarned of the hazardous condition of the birch tree and Respondent's devastating injury prevented.

On October 21, 1991, Petitioner filed a motion in limine which was granted by order of the district court (without opinion) on November 1, 1991. Under that order, Respondent was precluded from introducing into evidence, or making any reference whatsoever at trial, including in the testimony of Respondent's logging industry expert, to pulpwood logging regulations and standards promulgated by the Occupational Safety and Health Administration ("OSHA"), by the American National Standards Institute ("ANSI"), and/or by statutes of the states of Washington and Oregon. (R.84A-85A, 87A).

In accordance with the district court's ruling, this action was tried before a jury beginning November 4, 1991. At trial, Respondent's logging industry expert, Dr. Herbert I. Winer, whose report of September 9, 1988 relied heavily on the OSHA, ANSI, Oregon and Washington regulations, standards, and/or statutes to establish the standard of care applicable to Petitioner, was precluded from making any reference whatsoever to those regulations, standards and/or statutes. (R.99A-141A). Because of the district court's ruling in limine, Dr. Winer, when pointing to logging safety standards containing language which required the preliminary identification and/or removal of hazardous trees prior to the commencement of logging operations, was restricted to citing only a 1983 American Pulpwood Association ("APA") publication.[2] However, unlike the precluded industry-wide OSHA and ANSI standards, APA regulations are directed only to members and Petitioner was not an APA member.[3]

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[2] The actual publication, *Safe Manual Felling*, was offered into evidence during Respondent's case in chief and refused by the district court because it contained the precluded OSHA regulation, 29 CFR § 1910.266(c)(3)(ii). (R.169A, 383A-384A).

[3] The inapplicability of the APA version of this standard to Petitioner was made apparent at trial by the following questioning of Dr. Winer by the district court:

> THE COURT: All right, I think you said this [APA] material you were referring to spelled out very explicitly what should be done to remove the hazards; is that correct?
>
> A. Yes. Your Honor.
>
> THE COURT: But I think you also said *it did not address itself to whose obligation it was to remove the hazard,* but your own professional opinion is that it

On November 8, 1991, the jury returned a verdict for Petitioner based on a specific finding of "no negligence" and judgment was then entered for Petitioner. (R.89A-92A).

The Court of Appeals vacated the district court's judgment holding that the district court had abused its discretion in excluding the OSHA regulation as non-binding evidence of the standard of care which Respondent alleged was owed to him by Petitioner. *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1014 (3d Cir. 1992).

REASON FOR DENYING THE PETITION

THE DECISION OF THE COURT OF APPEALS NEITHER CONFLICTS WITH THE EXPRESS DIRECTIVES OF OSHA NOR THE DECISIONS OR OTHER CIRCUITS REGARDING OSHA'S PROHIBITION AGAINST USING THE REGULATIONS TO ENLARGE OR OTHERWISE AFFECT AN EMPLOYER'S COMMON LAW LIABILITY

Petitioner fails to appreciate the significant distinction between OSHA regulations being offered as non-binding versus binding evidence of a standard of care in

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includes everyone that is involved with the land on which the hazard is located. Is that a fair statement?
A. That is correct, Your Honor.
THE COURT: Would that portion of your testimony comes [sic] from your professional experience and not from this material which you referred to, *which identified how to do it but not who should do it?*
A. That is correct, Your Honor (emphasis added). (R.140A).

common law negligence actions. See *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1013-15 (3d Cir. 1992) (App. 8a-12a).

While there does appear to be a division among the federal judicial circuits in cases where OSHA regulations have been offered as binding evidence (i.e., negligence *per se*) of a standard of care in common law negligence actions,[4] no such conflict exists where the OSHA regulations are merely offered as evidence which the jury is ultimately free to accept or reject. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 713 n.22 (5th Cir. 1981) (plaintiff may properly offer OSHA regulation as evidence of defendant's negligence even when regulation cannot be used to establish negligence *per se*); *Barrera v. E.I. DuPont De Nemours & Co., Inc.*, 653 F.2d 915, 920-21 (5th Cir. 1981) (error in court's charge as to duties to invitees created by OSHA was ameliorated by later description of OSHA regulation as mere standard relevant to deciding what constituted negligence); *National Marine Service, Inc. v. Gulf Oil Co.*, 433 F.Supp. 913, 919 (E.D.La. 1977), affirmed 608 F.2d 522 (5th Cir. 1979) (OSHA regulation may be referred to as guide for the determination of standard of care). *Cf., Merritt v. Bethlehem Steel Corporation*, 875 F.2d 603, 608 (7th Cir. 1989) (whether safety standards of OSHA apply to landowner-contractee relationship is issue not necessary to resolve as Indiana workers' compensation law provided plaintiff's exclusive remedy); *Minichello v. U.S. Industries,*

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[4] Compare *Barrera v. E.I. DuPont De Nemours & Co., Inc.*, 653 F.2d 915, 920 (5th Cir. 1981) with *Teal v. E.I. DuPont De Nemours & Co.*, 728 F.2d 799, 805 (6th Cir. 1984).

Inc., 756 F.2d 26, 29 (6th Cir. 1985) (to use OSHA regulations to establish whether product is unreasonably dangerous is improper).

Since the Court of Appeals expressly decided that the OSHA regulation at issue could only be admitted as non-binding evidence of Petitioner's standard of care, Petitioner fails to state any reason for this Court to exercise its discretion and grant the requested review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 9, 1993